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No. 88-423

In the Supreme Court of the United States

OCTOBER TERM, 1988

MAYFAIR CONSTRUCTION COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner, a construction company, seeks review of the court of appeals' decision affirming the determination of the Armed Services Board of Contract Appeals that petitioner was not entitled to interest on the sum contained in a settlement proposal.

1. In September 1980, the Department of the Air Force awarded a contract to petitioner in the amount of $4,176,296 for the "Pacer Down" facilities restoration project at McConnell Air Force Base, Kansas. The contract contained a disputes clause that incorporated by reference the March 1979 version of the Defense Acquisition Regulation Disputes Clause.[1] In January 1982, the

[1] Defense Acquisition Regulation (DAR) 7-602.6(b) (Disputes) (1979) contained the following definition of "claim" (44 Fed. Reg. 12524 (1979)):

(1) a written request submitted to the Contracting Officer;

contracting officer terminated the contract for the convenience of the government. Petitioner, in June 1982, sent a letter to the contracting officer containing a "termination settlement proposal" in the amount of $990,937.29. Two months later, petitioner sent a second letter to the contracting officer denominating the earlier settlement proposal as a "claim" under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601 *et seq.*; petitioner also enclosed a "certification" of the proposal as a claim. In June and August 1984, petitioner submitted certified updates to the settlement proposal, both of which tendered settlement costs less than the original settlement offer of $990,937.29. Pet. App. 3-5, 46.

In December 1984, petitioner submitted an updated termination settlement proposal in the amount of $610,172, and certified this latest proposal as a claim under the CDA. In that proposal, petitioner included a request for $146,612.12 in interest, which petitioner designated as an element of its settlement expenses. Ultimately, in February 1985, petitioner and the government entered into Termination Supplemental Agreement No. A00001. Under that agreement, the government paid petitioner the undisputed amount of $438,346 for its termination costs; the agreement expressly reserved petitioner's demand for interest. The contracting officer, however, denied petitioner's interest demand, concluding that the settlement proposal and its various updated versions were not "claims" as defined by the applicable regulations incorporated in the original contract. Pet. App. 4-5, 46-48.

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(2) for payment of money, adjustment of contract terms, or other relief;

(3) which is in dispute or remains unresolved after a reasonable time for its review and disposition by the Government; and

(4) for which a Contracting Officer's decision is demanded.

2. Petitioner appealed the contracting officer's decision to the Armed Services Board of Contract Appeals (Board). The Board determined that the Disputes Clause of the contract defined "claim" to require the existence of a dispute. The Board found that "[e]xcept for the interest sought ($146,612.12), the settlement amount ultimately agreed upon ($438,346) was only $25,213.88 less than [petitioner's] updated proposal in December 1984 ($610,172). Thus, aside from the interest issue introduced by [petitioner] counsel, the termination for convenience settlement proceeded to agreement without apparent dispute" (Pet. App. 62). Given the absence of the requisite dispute, the Board concluded that no "claim" existed. Accordingly, the Board held that petitioner was not entitled to interest and denied petitioner's appeal. Pet. App. 5, 61-66.

3. The court of appeals affirmed. The court concluded that substantial evidence supported the Board's factual finding that no dispute existed between petitioner and the government. Moreover, under the controlling disputes clause in the contract, "no claim exists unless it involves a dispute" (Pet. App. 6). Accordingly, petitioner was not entitled to interest because its termination settlement proposal did not constitute a claim under the contract. Pet. App. 6-8.[2]

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[2] Because the contract itself resolved petitioner's request for interest, the court of appeals did not address petitioner's contention that the CDA does not require that a "claim" involve a disputed matter (Pet. App. 9-10).

Judge Bennett dissented. He first disagreed with the Board's conclusion that there was no "dispute." In his view, the record showed that the parties had substantial disagreements. Pet. App. 12-15. Judge Bennett also concluded that the CDA does not require a "claim" to be disputed and that the parties, by contractual provisions, should not be able to "sidestep[ ]" (Pet. App. 23) Congress's intention of permitting contractors to recover interest (Pet. App. 15-29).

4. The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

a. The CDA provides for the payment of interest on "claims" due contractors (41 U.S.C. 611), but does not define the meaning of a "claim" for these purposes. See 41 U.S.C. 601 ("Definitions"). Petitioner contends (Pet. 8-11), nevertheless, that the CDA mandates a definition of claims that includes—and thus requires the payment of interest on all contract settlements, regardless of whether any issues are in dispute. But petitioner points to nothing in either the language or the legislative history of the CDA to suggest that Congress specifically intended to require such a definition of a claim. The 1979 Defense Acquisition Regulation defining claims more narrowly to include only matters that are in dispute was therefore entirely consistent with the statute, and thus was entitled to judicial deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

In any event, as the court of appeals made clear (Pet. App. 9 n.*), petitioner's request for interest was governed by a disputes clause incorporated by the parties into the contractual provision that controlled the transaction. As the court of appeals correctly pointed out (Pet. App. 9-10), under these circumstances it was irrelevant whether the CDA implicitly adopts a broader definition of a claim, because "this would not mean that the CDA *prohibits* the parties from agreeing to such a requirement, and there is nothing in the language of the CDA to suggest such a prohibition" (*ibid.* (emphasis in original)). Accordingly, given the express terms of petitioner's contract, the court of appeals correctly concluded that petitioner's settlement proposals were not "claims" requiring payment of interest.[3]

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[3] Petitioner does not challenge the court of appeals' upholding of

b. In any event, the court of appeals' resolution of that narrow issue has no prospective importance. The contract clause contested in this case, Defense Acquisition Regulation (DAR) 7-602.6(b) (Disputes) (1979), was superseded by a clause issued on April 30, 1980, which applied to solicitations issued on or after June 1, 1980. The 1980 regulation does not contain the requirement which the court of appeals found to be dispositive, namely, that a "claim" must involve a matter in dispute. 45 Fed. Reg. 31035-31037 (1980); see Pet. App. 8-9, 90-100. The court of appeals' decision accordingly concerns what is at most a problem of diminishing importance and thus does not warrant this Court's review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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the Board's factual finding that petitioner's settlement was not a "disputed" claim.

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